Supreme Court, U.S.
FILED

02 268 JUN 17 2002

OFFICE OF THE CLERK

No. _____

# IN THE SUPREME COURT OF THE UNITED STATES

SAMUEL OCHOA, PETITIONER

*V.*

THE STATE OF ARIZONA, RESPONDENT

*ON PETITION FOR WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS, DIVISION TWO*

## PETITION FOR WRIT OF CERTIORARI

BERTRAM POLIS
COUNSEL OF RECORD
338 NORTH GRANADA AVENUE
TUCSON, ARIZONA 85701
(520) 884-9911

22pp

## QUESTIONS PRESENTED

1. Whether a knowing and intelligent waiver of *Miranda* rights can exist when the defendant tells police that he does not want his conversation to be tape recorded because he does not want what he says to be used against him.

2. Whether the Petitioner's statement, "I don't want what I say to be used against me," after *Miranda* advice was given, constituted an invocation of the Petitioner's fifth amendment privilege against self-incrimination inadmissible as evidence at trial.

# TABLE OF CONTENTS

Questions presented ..... i

Table of Authorities ..... iii

Opinions below ..... 1

Jurisdiction ..... 2

Constitutional provisions involved ..... 2

Statement of the case ..... 3

Summary of argument ..... 6

Argument:

I. Petitioner's statements should have been suppressed because the evidence clearly demonstrated that Petitioner did not understand his *Miranda* rights and thus could not have executed a valid waiver ..... 7

II. The admission of Petitioner's statement indicating that Petitioner did not "want what he said to be used against him" was improper as it constituted evidence of Petitioner's invocation of his fifth amendment privilege against self-incrimination ..... 11

Conclusion ..... 18

## TABLE OF AUTHORITIES

U.S. Const. amend. V ..... 2-3, 11

*Connecticut v. Barrett*,
479 U.S. 523, 107 S.Ct. 828 (1987) ..... 9-10

*Doyle v. Ohio*,
426 U.S. 610, 96 S.Ct. 2240 (1976) ..... 11-13, 15

*Johnson v. Zerbst*,
304 U.S. 458, 58 S.Ct. 1019 (1938) ..... 6, 7

*Miranda v. Arizona*,
384 U.S. 436, 86 S.Ct. 1602 (1966) ..... 7-8, 12

*Moran v. Burbine*,
475 U.S. 412, 106 S.Ct. 1135 (1986) ..... 7

*Wainwright v. Greenfield*,
474 U.S. 284, 106 S.Ct. 634 (1986) ..... 13-15

*Fields v. Leapley*,
30 F.3d 986 (8th Cir. 1994) ..... 15

*Franklin v. Duncan*,
70 F.3d 75 (9th Cir. 1995) ..... 15

*United States v. Valencia*,
773 F.2d 1037 (9th Cir. 1985) ..... 15

*United States v. Wycoff*,
545 F.2d 679 (9th Cir. 1977) ..... 8

*State v. Downing*,
171 Ariz. 431, 831 P.2d 430 (App. 1992) ..... 15

**IN THE SUPREME COURT OF THE UNITED STATES**

---

SAMUEL OCHOA, PETITIONER

*V.*

THE STATE OF ARIZONA, RESPONDENT

---

*ON PETITION FOR WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS, DIVISION TWO*

---

**PETITION FOR WRIT OF CERTIORARI**

---

Petitioner, Samuel Ochoa, respectfully prays that a writ of certiorari issue to review the judgment and order of the Arizona Court of Appeals, Division Two, entered on November 15, 2110.

## OPINIONS BELOW

The memorandum decision of the Arizona Court of Appeals, Division Two (Pet. App.[1] 1), is not reported. The Arizona Supreme Court's denial of Petitioner's application for discretionary review (Pet. App. 12) dated March 19, 2002, is not reported. The

---

[1] Petitioner's Appendix to Petition for Writ of Certiorari.

trial court's decision (Pet. App. 13) is also not reported.

## JURISDICTION

Jurisdiction is conferred upon this Court by 28 U.S.C.A. §1257 to review by writ of certiorari a final judgment rendered by the highest court of a state in which a decision could be had where any right under the Constitution of the United States is claimed.

## CONSTITUTIONAL PROVISIONS INVOLVED

The fifth amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy or life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property,

without due process of law; nor shall private property be taken for public use, without just compensation.

## STATEMENT OF THE CASE

Petitioner Samuel Ochoa was convicted of attempted first degree murder, aggravated assault with a deadly weapon, aggravated assault causing serious physical injury, endangerment, and drive-by shooting after a five-day jury trial in Pima County, Arizona. The charges arose from the October 17, 1998 shooting of Stephen Espinoza as he was driving his vehicle on Old Nogales Highway in Tucson. Mr. Espinoza identified Petitioner Ochoa as a person who shot at his vehicle from another vehicle as it was passing Espinoza's vehicle.

At trial, Petitioner Ochoa presented evidence regarding an on-going dispute between himself and the victim and introduced evidence that Mr. Espinoza had gang ties. Petitioner also presented alibi evidence demonstrating that at the time of the shooting, which took place between 2:00 and 2:30 a.m., Petitioner was injured and at home with his family after having accidentally shot himself in the foot at a party.

After Petitioner was arrested for the shooting, Tucson Police Department Detective Briamonte went to the South Tucson Police Department, where Petitioner Ochoa was being held in custody (Pet. App. 19-20). Detective Briamonte advised Petitioner of his

*Miranda* rights (Pet. App. 21). When Petitioner was asked whether he understood his rights, he allegedly responded "yes". *Id.* Petitioner was then asked if he would answer Detective Briamonte's questions, to which he allegedly responded in the affirmative again (Pet. App. 22). None of this conversation was tape-recorded, despite the fact that Detective Briamonte took out a tape recorder and placed it on top of the desk in the interview room while he was advising Petitioner of his rights. *Id.*

Petitioner pointed to the tape recorder and asked Detective Briamonte if it was on. *Id.* Detective Briamonte told Petitioner that it was not on (Pet. App. 23). Petitioner then said, "I won't talk with that on. I don't want what I say to be used against me." (Pet. App. 24-25). Detective Briamonte told Petitioner that the recorder was not on and that it was simply a tool to document his side of the story (Pet. App. 25). Petitioner Ochoa asked if he was being arrested and was told that he was already under arrest for shooting Mr. Espinoza. *Id.* Detective Briamonte told Petitioner that he knew that Petitioner shot Mr. Espinoza and that he knew what happened (Pet. App. 37). Petitioner agreed to talk to the detective, but not on tape (Pet. App. 25). Detective Briamonte never provided any additional clarification regarding the use of Petitioner's statement against him and did not tell Petitioner that even though the conversation would not be tape-recorded, it could still be used against him any way (Pet. App. 33).

At trial, Detective Briamonte testified that Petitioner Ochoa's "first quote ... after his response to *Miranda* was I won't --I won't talk with that on. I don't want what I say to be used against me" (Pet. App. 45). Reference to this statement was also made during the prosecutor's opening statement at trial when the jury was told that, after *Miranda* warnings were provided to him, Petitioner Ochoa agreed to talk to Detective Briamonte, but that he would only do it if it was off-tape (Pet. App. 41).

Petitioner then told Detective Briamonte that he had confronted Espinoza at a local taco stand and asked Espinoza if Espinoza had a problem with Petitioner's brother (Pet. App. 26). Petitioner told Briamonte that Espinoza said there was no problem, but after Espinoza walked away, he was attacked by several other people, who Petitioner believed were friends of Espinoza (Pet. App. 26-27). Petitioner said that somebody shot him in the foot during the attack. *Id.* Petitioner also told Briamonte that he did not shoot Espinoza and that he did not know who did (Pet. App. 28).

Prior to trial, Petitioner made a motion to suppress the statements made to Detective Briamonte alleging that admission of the statements would violate his fifth, sixth, and fourteenth amendment rights under the U.S. Constitution (Pet. App. 13). The motion was denied by the trial court (Pet App. 17) and the statement was introduced at trial. Although Petitioner never admitted to shooting the victim,

admission his statement at trial was not innocuous because it showed that Petitioner lied to the police about how he was shot in the foot.

## SUMMARY OF ARGUMENT

It is respectfully submitted that certiorari should be granted in this mater because important federal constitutional issues of law have been incorrectly decided in a manner which conflicts with relevant decisions of this Court. As demonstrated by his statement regarding the use of the tape recorder, Petitioner Ochoa clearly did not fully understand the nature of his Constitutional rights with respect to interrogation. The Arizona Court of Appeals has improperly presumed a level of comprehension upon Petitioner which is certainly not conveyed by Petitioner's statement, and which is not consistent with the State's "heavy burden" of proving a waiver and the Court's obligation to "indulge every reasonable presumption against waiver of fundamental constitutional rights." *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023 (1938). Furthermore, Petitioner's statement "I don't want what I say to be used against me" is clearly a valid invocation of Petitioner's constitutional privilege against self-incrimination and should not have been introduced as evidence against Petitioner.

## ARGUMENT

## I. Petitioner's statements should have been suppressed where the evidence clearly demonstrated that Petitioner did not understand his *Miranda* rights and thus could not have executed a valid waiver.

Detective Briamonte testified that after Petitioner was advised of his *Miranda* warnings, Petitioner pointed to a tape recorder and said, "I won't talk with that on. I don't want what I say to be used against me." (Pet. App. 45). Detective Briamonte told Petitioner that the tape recorder would only be used to document his side of the story and did not clarify for Petitioner that what he said, even if it was not tape-recorded, would still be used against him (Pet. App. 33).

In *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602 (1966), this Court held that before the government may introduce evidence of a defendant's statements at trial, it must show that the defendant was warned of his right to remain silent, that anything he says can be used against him in court, and that he has the right to the presence of an attorney and to have an attorney appointed before questioning if he cannot afford one. *Id.,* 384 U.S. at 473, 86 S.Ct. at 1627. If the interrogation continues and a statement is taken, "a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." *Id.*, 384 U.S. at 475,

86 S.Ct. at 1628.

In order to satisfy its burden, the prosecution must introduce sufficient evidence to establish that the defendant was aware of the "nature of the right being abandoned and the consequences of the decision to abandon it." *Moran v. Burbine*, 475 U.S. 412, 421, 106 S.Ct. 1135, 1141 (1986). The government's burden to make such a showing "is great," and the court will "indulge every reasonable presumption against waiver of fundamental constitutional rights." *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023 (1938).

In this case, the government's "heavy burden" simply was not sustained as the evidence clearly demonstrated that Petitioner did not understand his fifth amendment rights. Petitioner's statement to Detective Briamonte about the tape recorder and his not wanting what he said to be used against him clearly indicates Petitioner's intention to exercise his privilege against self-incrimination and his misunderstanding regarding the potential use of his un-recorded statement. As evidenced by his statement, Petitioner Ochoa obviously believed that what he said would not be used against him if it was not tape recorded. The matter was never clarified by Detective Briamonte, to the contrary, the detective told Petitioner that the tape recorder was simply a tool to record his side of the story. Under these circumstances, the State simply could not meet its "great" burden of showing that Petitioner Ochoa

possessed a full awareness of the nature of the right being abandoned and the consequences of his decision to abandon it.

In *Connecticut v. Barrett*, 479 U.S. 523, 107 S.Ct. 828 (1987), no error was found in the admission of statements where the defendant indicated that he would not give a written statement unless his attorney was present, but that had no problem talking with police about the incident. The *Barrett* court rejected a similar argument to that raised herein, that the defendant's "distinction between oral and written statements indicates an understanding of the consequences so incomplete that we should deem his limited invocation of the right to counsel effective for all purposes" only because there was direct testimony from the defendant, at trial, that he fully understood the *Miranda* warnings, including the fact that anything he said would be used against him in court. *Id.*, 479 U.S. at 530, 107 S.Ct. at 832.

Justice Brennan, in his concurring opinion, specifically noted, however, that in the absence of the defendant's trial testimony indicating that he understood his rights there could be no finding of a valid waiver because the "statement to police--that [Defendant] would talk to them, but allow nothing in writing without counsel--created doubt about whether he actually understood that anything he *said* could be used against him." *Id.*, 479 U.S. at 532, 107 S.Ct. at 834. Justice Brennan concluded that the statement standing alone was not a knowing and intelligent

waiver of the right to silence because a defendant cannot "voluntarily, knowingly, or intelligently waive a right that he or she does not understand to exist." *Id.*, 479 U.S. at 533 n. 2, 107 S.Ct. at 834 n. 2.

In the case at hand, Petitioner Ochoa's statement indicating that he would not talk with the tape recorder on because he did not want what he said to be used against him went even beyond the statement involved in *Barrett* in that Petitioner specifically maintained that the reason he was choosing not to make a recorded statement was based upon his belief that an unrecorded statement would not be used against him. As Justice Brennan's opinion in *Barrett* makes clear, this statement, absent any clarification by the police, creates doubt about whether Petitioner actually understood that anything he said (even unrecorded statements) could be used against him. Accordingly, the statement "militates against finding a knowing or intelligent waiver of the right to silence." *Id.*, 479 U.S. at 533, 107 S.Ct. at 834.

## II. The admission of Petitioner's statement indicating that he did not "want what he said to be used against him" was improper as it constituted evidence of Petitioner's invocation of his fifth amendment privilege against self-incrimination.

As previously indicated, after Petitioner Ochoa was arrested and read his *Miranda* warnings, he told Detective Briamonte that he would not talk with the tape recorder on and told him that "I don't want what I say to be used against me." (Pet. App. 24-25). Reference to this statement was made during the prosecutor's opening statement at trial when the jury was told that, after *Miranda* warnings were provided to him, Petitioner Ochoa agreed to talk to Detective Briamonte, but that he would only do it if it was off-tape (Pet. App. 41). Petitioner's invocation of his rights was also introduced during the state's case-in-chief when Detective Briamonte testified that Petitioner Ochoa's "first quote ... after his response to *Miranda* was I won't --I won't talk with that on. I don't want what I say to be used against me." (Pet. App. 45).

The fifth amendment guarantees that no person shall be "compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. Therefore, it is impermissible to penalize an individual for exercising his fifth amendment privilege when he is under police custodial interrogation. *Doyle v. Ohio,*

426 U.S. 610, 96 S.Ct. 2240 (1976)

In *Miranda v. Arizona, supra,* the court indicated that:

> In accord with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute *or claimed his privilege* in the face of accusation.

384 U.S. 436, 468 n. 37, 86 S.Ct. 1602, 1625 n. 37 (1966) (emphasis added).

In *Doyle v. Ohio, supra,* this Court held that the government's impeachment of the defendants' exculpatory testimony by asking them on cross-examination why they had not explained their conduct at the time of the arrest was fundamentally unfair and violated the Due Process Clause. The *Doyle* court based its finding on the implicit assurance contained in the *Miranda* warnings that silence will carry no penalty:

> Moreover, while it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any

> person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial.

*Doyle, supra*, 426 U.S. at 618, 96 S.Ct. at 2245.

In *Wainwright v. Greenfield*, 474 U.S. 284, 106 S.Ct. 634 (1986), this Court again considered the use of post-arrest, post-*Miranda* silence and held that use of such as evidence of sanity violated the Due Process Clause. The *Greenfield* court held that use of post-*Miranda* silence as affirmative proof at trial was just as impermissible as the use of such silence for impeachment purposes considered in *Doyle*:

> The point of the *Doyle* holding is that it is fundamentally unfair to promise an arrested person that his silence will not be used against him and thereafter to breach that promise by using the silence to impeach his trial testimony. It is equally unfair to breach that promise by using silence to overcome a defendant's plea of insanity. In both situations, the State gives warnings to protect constitutional rights and implicitly promises that any exercise of those rights

> will not be penalized. In both situations, the State then seeks to make use of the defendant's exercise of those rights in obtaining his conviction. The implicit promise, the breach, and the consequent penalty are identical in both situations.

*Wainwright v. Greenfield,* 474 U.S. at 292, 106 S.Ct. at 639.

The *Greenfield* court also recognized that post-*Miranda* warnings "silence" is not limited to silence, but also to statements expressing the invocation of rights under *Miranda:* "[W]e point out that silence does not mean only muteness; it includes the statement of a desire to remain silent, as well as of a desire to remain silent until an attorney has been consulted." *Id.,* 474 U.S. at 295 n. 13, 106 S.Ct. at 640 n. 13.

Thus, *Doyle* violations occur not only in situations where the government introduces evidence of a defendant's post-*Miranda* silence, but also in situations where a defendant's statement or actions exhibiting an intent to exercise his *Miranda* rights are introduced as evidence. As recognized by the *Greenfield* court, "What is impermissible is the evidentiary use of an individual's exercise of his constitutional rights after the State's assurance that the invocation of those rights will not be penalized." *Id.*, 474 U.S. at 295, 106 S.Ct. at 640.

For example, in *Fields v. Leapley*, 30 F.3d 986

(8th Cir. 1994), the state's use of the defendant's statement "I ain't saying nothing" to impeach the defendant constituted reversible error. In *Franklin v. Duncan*, 70 F.3d 75 (9th Cir. 1995), the prosecutor's comment on the defendant's silence and his pointing to a jail sign indicating that conversations might be monitored were held to violate his Fifth Amendment right against self-incrimination and required the granting of the defendant's petition for habeas corpus. In *United States v. Valencia,* 773 F.2d 1037 (9th Cir. 1985), and *United States v. Wycoff*, 545 F.2d 679 (9th Cir. 1977), references to the defendants' refusal to sign waiver forms after *Miranda* warnings were held to be impermissible.

In this case, Petitioner Ochoa's statement that he did not want what he said to be used against him was clearly an invocation of his fifth amendment privilege and, thus, should not have been admissible at trial because it created a negative inference of guilt. In *Doyle, supra,* the Court recognized that "Every post-arrest silence is insolubly ambiguous" and therefore is of "little probative force," yet it carries with it a "strong negative inference" that the defendant is guilty. 426 U.S. 610, 617, 96 S.Ct. 2240, 2244. As recognized in *State v. Downing*, 171 Ariz. 431, 434, 831 P.2d 430, 433 (App. 1992), "the potential implication flowing from a defendant's claim of silence is that he has something to conceal, and has not been open and forthright concerning his conduct."

This is precisely the implication resulting from

Petitioner Ochoa's statement that he did not want what he said to be used against him and this implication was even more prejudicial than Petitioner's silence alone would have been. Petitioner's statement invoking his fifth amendment privilege carried with it the implication Petitioner was involved in the shooting by exhibiting an apparent acknowledgment of culpability in that he feared that what he had to say could be used against him by police. In fact, the implication flowing from Petitioner's invocation of his fifth amendment privilege was far more prejudicial than his ultimate statement, in which Petitioner denied shooting Mr. Espinoza.

As indicated previously, the cornerstone of the *Doyle* prohibition against the use of post-Miranda invocations of rights is that it is unfair and misleading for police officers to inform a suspect of his rights under *Miranda* if there is no "assurance that [his] silence will carry no penalty." *Doyle,* 426 U.S. at 617-18, 96 S.Ct. at 2244-45. By the same token, it is unfair and misleading to advise a suspect that what he says will be used against him without the assurance that the claim of his privilege against self-incrimination itself will not carry any penalty. Although Petitioner Ochoa may not have been sophisticated enough to simply remain silent when advised of his rights, he did clearly convey his desire to invoke his privilege against self-incrimination by telling Detective Briamonte that he did not want what he said to be used against him. As *Miranda, Doyle,*

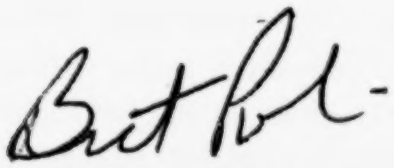
and subsequent cases make clear, evidentiary use of this statement is fundamentally unfair and violated Petitioner's right to Due Process of Law.

The admission of Petitioner's statement regarding the invocation of his fifth amendment privilege cannot be said to be harmless beyond a reasonable doubt. The evidence in this case boiled down to a pure credibility contest between the victim Espinoza and the defendant's witnesses. Evidence suggested that both sides had grudges against each other and, other than the Espinoza's identification, there was no direct evidence of Petitioner's involvement in the shooting. Thus, given the importance of Petitioner's credibility in this matter, the disputed evidence clearly was prejudicial enough to have affected the outcome of the proceedings.

## CONCLUSION

For the foregoing reasons, it is respectfully requested that this Honorable Court issue a writ of certiorari to review the judgment and order of the Arizona Court of Appeals, Division Two, because the admission of Petitioner's statement and invocation of rights at trial was constitutionally impermissible.

Respectfully submitted this 17th day of June, 2002.



BERTRAM POLIS
Attorney for Petitioner
338 N. Granada Avenue
Tucson, Arizona 85701
(520) 884-9911

Supreme Court, U.S.
FILED

02 268 JUN 17 2002

OFFICE OF THE CLERK

No. _____

# IN THE SUPREME COURT OF THE UNITED STATES

SAMUEL OCHOA, PETITIONER

*v.*

THE STATE OF ARIZONA, RESPONDENT

*ON PETITION FOR WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS, DIVISION TWO*

## PETITIONER'S APPENDIX TO PETITION FOR WRIT OF CERTIORARI

BERTRAM POLIS
COUNSEL OF RECORD
338 NORTH GRANADA AVENUE
TUCSON, ARIZONA 85701
(520) 884-9911

48pp

## TABLE OF CONTENTS

Decision of the Arizona Court of Appeals,
Division Two ..... 1

Arizona Supreme Court Order denying
Petition for Review ..... 12

Petitioner's Motion to Suppress Statements ..... 13

Trial Court Minute Entry denying
Motion to Suppress Statements ..... 17

Transcript of Motion to Suppress Hearing,
November 4, 1999 (Excerpt) ..... 18

Transcript of Jury Trial, Day One,
November 14, 2000 (Excerpt) ..... 39

Transcript of Jury Trial, Day Three,
November 16, 2000 (Excerpt) ..... 42

FILED BY CLERK
NOV 15 2001
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

| | |
|---|---|
| THE STATE OF ARIZONA, Appellee, v. SAMUEL OCHOA, Appellant. | 2CA-CR00-0542<br>DEPARTMENT A<br><br>MEMORANDUM DECISION<br>Nor for Publication<br>Rule 111, Rules of the Supreme Court |

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY
Cause No. CR-64102
Honorable Richard Nichols, Judge

AFFIRMED

---

Janet Napolitano, Arizona Attorney General
By Randall M. Howe and Joseph L. Parkhurst Tucson
Attorneys for Appellee

Polis & Hartshorne, P.C.
By Bertram Polis Tucson
Attorneys for Appellant

---

P E L A N D E R, Judge.

¶1 A jury found appellant Samuel Ochoa guilty of attempted first-degree murder, two counts of aggravated assault, endangerment, and drive-by shooting. The trial court sentenced him to concurrent, aggravated prison terms, the longest of which was fifteen years. None of the issues Ochoa raises on appeal merits reversal.

## BACKGROUND

¶2 We view the evidence and all reasonable inferences therefrom in the light most favorable to sustaining the verdicts. *State v. Atwood,* 171 Ariz. 576, 596, 832 P.2d 593, 613 (1992). Ochoa and the victim had an altercation at a taco stand, apparently relating to a previous exchange of guns between the victim and Ochoa's brother, Cesar. After the victim had left and was later driving in a different area, a vehicle driven by Cesar pulled up next to the victim's vehicle. Ochoa leaned out the passenger-side window and yelled at the victim. As Cesar then tried to force the victim's vehicle off the road, Ochoa fired several shots at the victim. Ochoa continued shooting after the victim's went off the roadway and came to rest against a dirt embankment. The victim suffered serious injuries, and one of his passengers also was wounded.

¶3 After police apprehended Ochoa, Detective Briamonte informed him of his *Miranda*[1] rights. Briamonte then asked Ochoa if he understood his rights and would agree to waive them. Ochoa responded affirmatively to both questions. When Briamonte displayed a tape recorder, however, Ochoa said, "I won't talk with that on. I don't want what I say to be used against me." Briamonte did not clarify that anything Ochoa said, whether tape-recorded or not, could be used against him. After Briamonte explained that the tape recorder "was simply a tool

---

[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

to document the conversation" and that Ochoa already was under arrest for shooting the victim, Ochoa said, "I'll talk to you, but not on the tape."

¶4 Ochoa then made a statement in which he denied having shot the victim. Thereafter, he invoked both his right to remain silent and his right to counsel, and all questioning ceased. At trial, Ochoa presented an alibi defense that significantly conflicted with his statement to Briamonte.[2]

## *MIRANDA* ISSUES

### Motion to Suppress

¶5 Before trial, Ochoa moved to suppress his statement to Briamonte, arguing he had not knowingly and intelligently waived his right to remain silent.[3] Specifically, he contended the portion of his statement in which he had said, "I won't talk with [the tape recorder] on. I don't want what I say to be used against me," revealed a complete lack of understanding of his right to remain silent and thereby invalidated his earlier waiver of that right. After conducting an evidentiary hearing, the trial court denied Ochoa's motion. Ochoa challenges that ruling, which we review for clear and manifest error. *State v. Hitch,* 160 Ariz. 297, 302, 772 P.2d 1150, 1155

---

[2] On the night of the offenses, Ochoa was shot in his foot. In his statement to Briamonte, Ochoa explained that the injury had occurred during a second altercation at the taco stand after the victim had left. At trial, however, Ochoa presented evidence through other witnesses that he had accidentally shot himself in the foot at a family gathering and that family members then had taken him home, where he had remained for the rest of the night.

[3] Ochoa does not claim that his statement was otherwise involuntary. Accordingly, we do not address that particular issue. *See Moran v. Burbine,* 475 U.S. 412, 421, 106 S. Ct. 1135, 1141, 89 L. Ed. 2d 410, 421 (1986) (waiver of Miranda rights has two distinct components, voluntariness and comprehension); *State v. Carrillo,* 156 Ariz. 125, 134-35, 750 P.2d 883, 892-93 (1988) (voluntariness inquiry conducted separately "[s]o long as defendant's waiver of *Miranda* was truly cognitive").

(App. 1989). In doing so, we view the evidence presented at the suppression hearing and reasonable inferences therefrom in the light most favorable to sustaining the trial court's ruling. *State v. Smith,* 197 Ariz. 333, ¶2, 4 P.3d 388, ¶2 (App. 1999).

¶6 Absent police overreaching, a defendant's statement made during custodial interrogation is admissible if the state establishes that the defendant knowingly and intelligently waived the right to remain silent and the right to the assistance of counsel. *Moran v. Burbine,* 475 U.S. 412, 421, 106 S. Ct. 1135, 1141, 89 L. Ed. 2d 410, 421 (1986); *Hitch,* 160 Ariz. At 302, 772 P. 2d at 1155. "[T]he waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Moran,* 475 U.S. at 421, 106 S. Ct. at 1141, 89 L. Ed. 2d at 421. Whether such a waiver is knowing and intelligent is a fact-intensive inquiry that depends on the totality of the circumstances. *Id.; Hitch.*

¶7 By denying Ochoa's motion to suppress, the trial court implicitly found he had knowingly and intelligently waived his right to remain silent. *See State v. Fodor,* 179 Ariz. 442, 454, 880 P.2d 662, 674 (App. 1994). For several reasons, we cannot fault that finding. First, after Briamonte advised him of his rights, Ochoa expressly said that he understood them and agreed to waive them. Second, the portion of Ochoa's statement at issue here, viewed in context, does not reveal a dearth of understanding, particularly in light of Ochoa's subsequent statement, "I'll talk to you, but not on the tape." *See Connecticut v. Barrett,* 479 U.S. 523, 539 n.4, 107 S. Ct. 828, 832 n.4, 93 L. Ed. 2d 920, 929 n.4 (1987) ("[T]here may be several strategic reasons why a defendant willing to speak to the police would still refuse to write out his answers to questions, or to sign a transcript of his answers prepared by the police...."). Rather, it reveals only that Ochoa would invoke his right to remain silent under a certain condition that did not

arise--Briamonte's using the tape recorder. Finally, Ochoa eventually did exercise his right and thereby demonstrated his understanding of them. *See State v. Carrillo*, 156 Ariz. 125, 131, 750 P.2d 883, 889 (1988) ("When [the defendant] stopped the final interrogation session and sought the aid of counsel, he vividly demonstrated an understanding of his predicament and of his constitutional rights."). Given the totality of the circumstances, we cannot say the trial court committed clear and manifest error in denying Ochoa's motion to suppress his statement.

**Alleged Invocation of Right to Remain Silent**

¶8 During his opening statement at trial, the prosecutor stated that, after Ochoa had received *Miranda* warnings, he had agreed to talk to Briamonte but only is the conversation was not tape-recorded. Briamonte then testified at trial that Ochoa's "first quote...after his response to Miranda was I won't-I won't talk with that on. I don't want what I say to be used against me." Ochoa immediately moved for a mistrial, which the trial court denied.

¶9 As he did below, Ochoa contends a mistrial was required because the prosecutor improperly and prejudicially referred to an "invocation of his rights" and to his post-*Miranda* silence. Ochoa essentially argues that he had invoked his right to remain silent by saying, "I don't want what I say to be used against me," and, therefore, that portion of his statement was inadmissible. Absent an abuse of discretion, we will not overturn a trial court's ruling on a motion for a mistrial. *State v. Gilfillan,* 196 Ariz. 396, ¶35, 998 P.2d 1069, ¶35 (App. 2000).

¶10 As Ochoa correctly points out, it is well settled that the state may not introduce evidence of or comment on a defendant's post-*Miranda* silence to imply guilt. *Doyle v. Ohio,* 426 U.S. 610, 619, 96 S. Ct. 2240, 2245, 49 L. Ed. 2d 91, 98 (1976); *Carrillo,* 156 Ariz. at 128, 750 P.2d at 886; *State v. Sorrell,* 132 Ariz. 328, 329-30, 645 P.2d 1242, 1243-44 (1982); *State v.*

*Bowie,* 119 Ariz. 336, 341, 580 P.2d 1190, 1195 (1978). This rule rests on the conceptual foundation that it is fundamentally unfair for the state to implicitly assure a suspect that his or her silence will not be used against him or her and then later use that silence to impeach the defendant or to suggest guilt. *State v. Keeley,* 178 Ariz. 233, 235, 871 P.2d 1169, 1171 (App. 1994). Exclusion of a defendant's post-*Miranda* silence, of course, extends to a defendant's expression of an intent to remain silent. *Wainright v. Greenfield,* 474 U.S. 284, 295 n.13, 106 S. Ct. 634, 640 n.13, 88 L.Ed. 2d 623, 632 n.13 (1986). But in all circumstances, the key inquiry is whether the defendant actually remained silent. *See Anderson v. Charles,* 447 U.S. 404, 408, 100 S.Ct. 2180, 2182, 65 L. Ed. 222, 226 (1980); *State v. Anaya,* 170 Ariz. 436, 442, 825 P.2d 961, 967 (App. 1991). Accordingly, the rule does not apply to "a defendant who voluntarily speaks after receiving *Miranda* warnings "because he or she "has not remained silent at all." *Anderson,* 447 U.S. at 408, 100 S. Ct. At 2182, 65 L.Ed. 2d at 226.

¶11 As noted above, the trial court did not clearly err in ruling that Ochoa had knowingly and intelligently waived his *Miranda* rights. Because Ochoa thereafter voluntarily agreed to and did give an unrecorded statement, Briamonte's testimony about specific aspects of that statement was permissible. *Anderson.* The evidence Ochoa challenges was not an improper comment on his invocation of *Miranda* rights but, rather, merely referred to what Ochoa had said after having waived those rights. Moreover, the state's ostensible purpose for introducing that evidence was not to imply Ochoa's guilt, but to explain the absence of a tape-recording. Thus, the trial court did not abuse its discretion in denying Ochoa's motion for a mistrial.

## EVIDENTIARY ISSUES

¶12 Ochoa next contends that, in three respects, the trial court erred in admitting certain evidence. We review a trial court's evidentiary rulings for an abuse of discretion. *State v. Fisher,* 141 Ariz. 227, 242, 686 P.2d 750, 765 (1984).

**Prior Consistent Statement**

¶13 At trial, Officer Hernandez testified that the victim had told him Ochoa had been riding in either a white Ford pick-up or a green Dodge Intrepid, probably the former, when the shooting occurred. The victim testified, however, that Ochoa had been in a green Dodge Intrepid when the shooting occurred and that the victim previously had told Hernandez that Ochoa had been driving a white Ford pick-up earlier in the evening. Ochoa objected, arguing that the victim's testimony about what he previously had told Hernandez was hearsay because it was a prior statement consistent with his trial testimony and that Ochoa had made no charge of recent fabrication. *See* Ariz. R. Evid. 801(d)(1)(B), 17A A.R.S. The trial court overruled Ochoa's objection.

¶14 Generally, prior consistent statements are inadmissible hearsay. Ariz. R. Evid. 801(c),(d)(1). But, such statements are not hearsay if they are "offered to rebut an express or implied charge" that the witness has recently fabricated testimony. Ariz. R. Evid. 801(d)(1)(B).

¶15 Ochoa argues that he made no such charge about the victim's testimony. During his opening statement, however, Ochoa said:

> [The victim], as you will see, has a memory that gets better over time. . . . [The victim] says that at 2:30 . . .Ochoa was either in a green Intrepid or in a [w]hite Ford pickup depending on which version...of the incident you choose to believe.

> Because on the night in question when the officer spoke with him he said that. . . Ochoa was in a white Ford pickup last seen heading southbound on Old Nogales Highway...and that there was a green Intrepid also involved.
>
> Later on [Ochoa] is transferred from the pickup to the green Intrepid. And that's later on. [The victim] decides that [Ochoa] is in the green Intrepid and shooting from there.

This sufficiently raised an inference of recent fabrication to permit admission of a prior consistent statement. *See Phoenix Assocs. III v. Stone,* 60 F.3d 95, 104 (2d Cir. 1995) (charge of recent fabrication raised in opening statement). Thus, the trial court did not abuse its discretion in admitting the victim's testimony about his prior statement to Hernandez.

**Character Evidence**

¶16 Ochoa's sister testified that she had stored guns for their brother, Cesar, and that she had not informed her husband of that fact. She also testified that three children lived in her home. Ochoa objected to this testimony on relevance grounds and then moved for a mistrial, claiming the evidence improperly attacked his sister's character. The trial court overruled the objection and denied the motion for a mistrial.

¶17 On appeal, Ochoa only contends these aspects of his sister's testimony were inadmissible under Rule 404(a), Ariz. R. Evid. With certain exceptions, Rule 404(a) prohibits the use of character evidence "for the purpose of proving action in conformity therewith." By its terms, the rules does not preclude evidence that pertains to a witness's character and that is offered for reasons other than proving "action in conformity therewith." In addition, one exception to the rule's prohibition is evidence of specific instances of a witness's conduct that relate to the witness's character for truthfulness or untruthfulness. Ariz. R. Evid. 404(a)(3), 608(b)(1).

¶18 Ochoa's sister's testimony that she had not told her husband about having stored Cesar's guns arguably constitutes a specific instance of conduct relating to her character for truthfulness; therefore, it was admissible under Rule 608(b)(1). Additionally, Ochoa has not identified here or below what character trait is established by the presence of children in his sister's home. But, even assuming the presence of guns and children in the same home reflected poorly on his sister and revealed a flawed character trait, Ochoa has not shown that the state elicited that testimony to prove"action in conformity therewith" Ariz. R. Evid. 404(a). Absent that element, we cannot conclude the trial court abused its discretion in admitting this evidence and denying Ochoa's motion for a mistrial. *See Gilfillan,* 196 Ariz. 396, ¶35, 998 P.2d 1069, ¶35. Finally, even if the trial court should have excluded these aspects of the sister's testimony, on this record it is not reasonably probable the jury would have reached a different verdict had the evidence not been admitted. *See State v. Lacy,* 187 Ariz. 340, 348-49, 929 P.2d 1288, 1296-97 (1996). *See also* Ariz. Const. Art. VI, §27.

**Evidence Rebutting Alibi Defense**

¶19 Ochoa's father testified that he had treated Ochoa's gunshot wound and, with the exception of a short period of time when he had gone to a pharmacy to obtain medical supplies, that he had remained at home with Ochoa on the night of the offenses. To corroborate his father's testimony, Ochoa introduced a pharmacy receipt that showed his father had made a purchase at 2:14 a.m., placing Ochoa's father at home with him at the time the offenses occurred.

¶20 To rebut Ochoa's alibi defense, the state called the pharmacy manager as a witness. He testified that times reflect on receipts generally were not accurate because the registers that produced the receipts did not automatically reset to the correct time after power outages. He

further testified that the times printed on receipts were generally five to fifteen minutes earlier than the actual time of the transactions. On cross-examination, however, he admitted that he did not know if the registers had been calibrated before Ochoa's father's purchase and, therefore, that it was possible Ochoa's father's receipt bore the correct time.

¶21 Ochoa argues there was insufficient foundation for the pharmacy manager's testimony because he did not know if the registers were printing the correct time on the day in question. Even if Ochoa has not waived this issue by failing to cite any supporting authority, *see* Rule 31.13(c)(1)(vi), Ariz. R. Crim. P., 17 A.R.S.; *State v. Carver,* 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989), we are not persuaded.

¶22 Under Rule 602, Ariz. R. Evid., a witness's testimony is admissible so long as he or she has "personal knowledge" of the subject matter about which the witness is testifying. Here, the pharmacy manager had the requisite personal knowledge to testify. That he could not conclusively establish that the time printed on the receipt was inaccurate went to the weight of the evidence, not its admissibility. *See State v. Hatton,* 116 Ariz. 142, 149, 568 P.2d 1040, 1047 (1977) ("that the [evidence was] not a conclusive link in the case goes only to the weight and not to the admissibility of the evidence.") Consequently, the trial court did not abuse its discretion in admitting the pharmacy manager's testimony.

## DISPOSITION

¶23 Ochoa's convictions and sentences are affirmed.

JOHN PELANDER, Judge

CONCURRING:

_____

J. WILLIAM BRAMMER, JR., Presiding Judge

_____

M. JAN FLOREZ, Judge

**SUPREME COURT**

NOEL K. DESSAINT
CLERK OF COURT

STATE OF ARIZONA

402 ARIZONA STATE
COURTS BUILDING
1501 WEST WASHINGTON
PHOENIX, ARIZONA
TELEPHONE: (602) 542-9396

KATHLEEN E.
KEMPLEY
CHIEF DEPUTY
CLERK

March 21, 2002

**RE: STATE OF ARIZONA vs SAMUEL OCHOA**
Arizona Supreme Court No. CR-01-0467-PR
Court of Appeals Division Two No. 2 CA-CR 00-0542
Pima County Superior Court No. CR-64102

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on March 19, 2002, in regard to the above-referenced cause:

**ORDERED: Petition for Review by the Supreme Court = DENIED.**

Record returned to the Court of Appeals, Division Two, Tucson, this 21st day of March, 2002.

Noel K. Dessaint, Clerk

TO:
Hon Janet A Napolitano, Arizona Attorney General
Attn: Randall M Howe
Joseph L. Parkhurst, Assistant Attorney General, Tucson Office
Bertram Polis, Polis & Hartshorne PC
Samuel Ochoa, ADOC #155678, Arizona State Prison, Winslow-Kaibab North Unit
West Publishing Company
Lexis-Nexis
Jeffrey P Handler, Clerk, Court of Appeals, Division Two, Tucson
kg

RECEIVED MAR 25 2002

**Polis & Hartshorne, P.C.**
338 North Granada Avenue
Tucson, Arizona 85701-8212
(520) 884-9911
By Bertram Polis
Attorney No. 45540
Attorney for Defendant

COPY
April 28, 1999
Patricia A. Noland
Clerk, Superior Court

**IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
**IN AND FOR THE COUNTY OF PIMA**

| | | |
|---|---|---|
| STATE OF ARIZONA, | ) | |
| | ) | No. CR-64102 |
| Plaintiff, | ) | |
| | ) | **MOTION TO SUPPRESS** |
| vs. | ) | **STATEMENTS** |
| | ) | |
| SAMUEL OCHOA, | ) | |
| | ) | Hon. Richard Nichols |
| Defendant. | ) | |
| | ) | |

The Defendant, Samuel Ochoa, through undersigned counsel, hereby moves this Court for its Order suppressing any and all statements made by Defendant on the grounds that said statements were obtained in violation of Defendant's fifth, sixth, and fourteenth amendment rights under the U.S. Constitution and in violation of Article II, § 4 of the Arizona Constitution. The grounds for this motion are more fully set forth in the accompanying Memorandum of Points and Authorities.

RESPECTFULLY SUBMITTED April 28, 1999.

POLIS & HARTSHORNE, P.C.

BERTRAM POLIS
Attorney for Defendant

## MEMORANDUM OF POINTS AND AUTHORITIES

FACTS:

On December 23, 1998, Defendant was arrested on a warrant charging him with attempted first degree murder, aggravated assault, endangerment, drive by shooting, and attempted second degree murder. Defendant was transported to the police station where he was interrogated by TPD Detective Briamonte.

At the outset of the interrogation, Defendant advised Det. Briamonte that he did not want the detective to record the conversation, telling him that "I don't want what I say to be used against me." Without further clarification of the purpose of the interrogation, Det. Briamonte agreed not to tape record the conversation and continued questioning Defendant. After answering the detective's questions, Defendant said, "No matter what I say, I'm going to jail then?" When Det. Briamonte replied that he would be going to jail, Defendant requested an attorney and the interrogation ended.

ARGUMENT:

The State has the burden of proving that statements elicited from a defendant while in custody were voluntarily made and taken in compliance with the defendant's *Miranda* rights. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). In *Berkemer v. McCarty*, 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984), the Supreme Court reaffirmed the principles of *Miranda* and held that a person subjected to custodial interrogation is entitled to *Miranda* warnings regardless of the nature or severity of the offense.

In the instant case, it is submitted that the State will not be able to meet its burden of proving that Defendant's statements were taken in compliance with *Miranda* and that any statements obtained were the result of a valid, knowing and voluntary waiver of those rights. It is clear that Defendant believed that his statements to Det. Briamonte would not be used against him. As such, Defendant can not have been properly advised of his *Miranda* warnings and any subsequent "waiver" was certainly not knowledgeable.

"A heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." *Miranda*, 384 U.S. at 475, 86 S.Ct. at 1628. In this case, it is clear that Defendant did not understand that his statements would in fact be used against him and instead of properly advising Defendant of this, Det. Briamonte simply continued the interrogation. Under these circumstances, it is submitted that the State cannot meet its heavy burden of establishing that Defendant executed a knowing and intelligent waiver of his rights. As such, all statements made by Defendant must be suppressed.

It is further submitted that Defendant's statements were not voluntarily made and were not the "product of an essentially free and unconstrained choice by its maker." *Columbe v. Connecticut*, 367 U.S. 568, 602 (1961). As such, admission of the statements would violate Defendant's right to due process of law guaranteed by the fourteenth amendment. *Columbe, supra; Jackson v. Denno*, 378 U.S. 368 (1964).

Defendant was led to believe that his statements might get him released from police custody. In order for a confession or statement to be deemed voluntary, however, it must not be obtained by a direct or implied promise, however slight. *State v. Griffen*, 148 Ariz. 82, 713 P.2d 283 (1986); *State v. McFall*, 103 Ariz. 234, 439 P.2d 805 (1968). It is submitted that Defendant's invocation of his right to an attorney at the time he was finally told he would be taken into custody regardless of his statements demonstrates that his previous statements were elicited as a result of the belief that he would receive a benefit in exchange for them. Accordingly, the statements are involuntary and must be suppressed.

Based on the foregoing, Defendant Ochoa respectfully requests that this Court issue its Order suppressing any and all statements made by him and suppressing any evidence obtained as a result of those statements.

RESPECTFULLY SUBMITTED April 28, 1999.

POLIS & HARTSHORNE, P.C.

_____

BERTRAM POLIS

COPY mailed/delivered this
28 day of April, 1999, to:

Daniel Nicolini, Esq.
Pima County Attorney's Office
32 N. Stone Avenue, 14th Floor
Tucson, Arizona 85701

By: signature

FILED
PATRICIA A. NOLAND
CLERK, SUPERIOR COURT
November 15, 1999 (10:27 a.m.)
By: Pat Dini

ARIZONA SUPERIOR COURT, PIMA COUNTY

JUDGE: HON. RICHARD NICHOLS CASE NO. **CR-64102**

COURT REPORTER: NONE DATE: NOVEMBER 15, 1999

STATE OF ARIZONA

VS.

SAMUEL (NMN) OCHOA

---

**MINUTE ENTRY**

---

DEFENDANT'S MOTION TO SUPPRESS STATEMENTS:

IT IS ORDERED that the motion is denied.

cc: Hon. Richard Nichols
Criminal Calendaring
County Attorney - Nicolini
Bertram Polis, Esq.

RECEIVED
NOV 17 1999

Pat Dini
Deputy Clerk

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

| | | |
|---|---|---|
| STATE OF ARIZONA, | ) | |
| | ) | |
| Plaintiff, | ) | |
| vs. | ) | NO. CR-64102 |
| SAMUEL NMN OCHOA, | ) | |
| | ) | |
| Defendant. | ) | |
| | ) | |

BEFORE: THE HONORABLE RICHARD D. NICHOLS, JUDGE

Division 14

APPEARANCES:

DANIEL A. NICOLINI, Esq.
On behalf of the State:

COPY

BERTRAM POLIS, Esq.
On behalf of the Defendant.

MOTION TO SUPPRESS

November 4, 1999

Denise M. Gonzales, RMR
Certified Court Reporter

DEFENSE

A. The vehicles were moving, driving around in the area of Thoroughbred and Nogales.

Q. Was the victim, Mr. Espinosa, in a car?

A. Yes. He was driving.

Q. He was driving a car? All right. And what did he tell you about the position of the shooter in the other car?

A. The shooter was in the front passenger seat. And that there was an additional shooter in the rear passenger seat, would be on the passenger side.

Q. Was he able to identify the shooter in the rear?

A.. No.

Q. But he indicated Sam Ochoa was in the right front seat of this other car?

A. That's what the victim told me.

Q. All right. Was a warrant issued for Sam Ochoa's arrest after your interview with the victim?

A. Yes.

Q. When was he arrested?

A. He was arrested December 23 rd, 1998.

Q. Who initially encountered him or detained him?

A. South Tucson Police Department.

Q. And that – did that include Officer Ginzer

who was just here and left?

A. I believe so, yes.

Q. Did you – were you called out at the time of his arrest?

A. Yes.

Q. Did you go to the scene of the stop?

A. Yes.

Q. Did you meet the Defendant, Sam Ochoa?

A. Yes.

Q. Where did you meet him?

A. South Tucson police station.

Q. You recognize him here in court today?

A. Yes.

Q. Can you point him out, indicate what he's wearing?

A. Dark colored three-piece suit sitting at the Defense table, glasses and a mustache.

MR. NICOLINI: May the record reflect he's identified the Defendant?

THE COURT: Yes.

BY MR. NICOLINI:

Q. When you met Mr. Ochoa did you introduce yourself?

A. Yes

Q. Did you tell him why you were there?
A. Yes.
Q. Did you read him his Miranda rights?
A. Yes, I did.
Q. Could you tell the Court what you told him about his rights?
A. I read them from my card.
Q. Do you have your card with you?
A. Yes, I do.
Q. Could you take it out and read it for the record nice and slow so the court reporter can get it?
A. You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to the presence of an attorney to assist you prior to questioning and to be with you during questioning if you so desire.

If you cannot afford an attorney, you have the right to have an attorney appointed for you prior to questioning. Do you understand these rights?
Q. Did he respond to that question?
A. Yes.
Q. What did he say?
A. Yes.
Q. Did you ask another question
A. Yes.

Q. What was that?
A. Now having been advised of these rights and understanding these rights, will you answer my questions.
Q. What did he say to that?
A. Yes.
Q. Okay. Now, is it your practice to normally tape-record interviews with persons being interviewed?
A. Yes.
Q. What's the reason for that?
MR. POLIS: Objection, irrelevant.
THE COURT: Overruled.
A. To preserve their exact words and what was said in the interview and to have a written transcript of verbatim what was said in the interview.
Q. Okay. Did you have a tape-recorder with you when you interviewed Mr. Ochoa?
A. Yes.
Q. What, did you take it out and put it on the table?
A. It was with my notebook and my notepad. And I put it on the desk there as I was reading him his rights.
Q. Did Mr. Ochoa have anything to say about it?
A. Yes.
Q. What did he say?
A. He pointed to it and asked me if it was on.

Q. And your response?
A. And I told him no.
Q. Tell us about the conversation you had concerning the tape-recorder.
A. I documented in my notebooks some quotes of what he said. Would it be okay if I saw my report?
Q. Sure. Did you write a report of this interview and other aspects of the investigation shortly after they occurred?
A. I documented in my notebook what – the events after they occurred. And then I incorporated in my supplement which I believe I did in February.
Q. All right. And in writing the supplement or report did you rely on notes that you had made contemporaneously with the events, in other words, at the same time?
A. Yes, yes.
Q. Do you still have those notes?
A. Yes.
Q. Were the notes destroyed?
A. Yes, they were.
Q. Let me show you State's Exhibit 1 for identification. Do you recognize that?
A. Yes. That's my supplement.
Q. Okay. And in that supplement on page two

did you summarize the meeting, interview with Mr. Ochoa?

MR. POLIS: Pardon me, object to the leading nature of the question. And object to the –

THE COURT: Sustained.

BY MR. NICOLINI:

Q. All right. Using the report to refresh your recollection if necessary, could you tell the Court about the conversation with Mr. Ochoa concerning the tape-recorder?

MR. POLIS: Object to the form of the question. He can refresh his recollection by looking at the report. What I would like – I think it's proper to do that, but I don't think it's proper to have the report in front of him and to testify sometimes coming from the report, sometimes coming from memory.

THE COURT: Could you tell us accurately what the conversation was without referring to the report?

THE WITNESS: Not 100 percent, Your Honor, because I have his exact words in quotes in my report. I would have to read them.

THE COURT: I'll let him read from his report. Go ahead.

A After he asked about the tape-recorder, he said – I quote – I won't talk with that on. I don't want

what I say to be used against me, end quote.

Q. Okay. How did you respond to that?

A. I told him that the recorder was simply a tool to document the conversation, basically.

Q. And did he have a further statement or response?

A. Yes. If I could refer back to his first quote.

Q. Okay, please.

A. He said – he asked me if he was being arrested. And then I explained to him that he was already under arrest for shooting Stephan Espinosa. And then he said – and this a quote – I'll talk to you, but not on the tape, end quote.

Q. Okay. And did you agree to that?

A. Yes.

Q. Did you then interview him?

A. Yes.

Q. And did you not tape-record it?

A. Correct.

Q. So you agreed to do what he wanted?

A. Yes.

MR. POLIS: Object to the characterization, move to strike.

THE COURT: Sustained.

BY MR. NICOLINI:

Q. Did you – and, again, did you make notes of the conversation which you used to write this report later?

A. Yes.

Q. Could you summarize what Mr. Ochoa had to say about any encounter with Stephan Espinosa on October 17 th?

MR. POLIS: Object to the form of the question, Your Honor.

THE COURT: Overruled.

A. Yes. He said that he had – he spoke to Stephan Espinosa at the BK Taco Stand. And he asked him if he had a problem with his – Mr. – Mr. Ochoa asked Mr. Espinosa if he had a problem with his brother, Cesar Ochoa.

Q. Okay.

A. And Mr. Espinosa said that he didn't. And at some point during that conversation or that contact a fight broke out where Mr. – Mr. Ochoa said that he was attacked by a number of people. And at some point in the middle of that a shot was fired and he was shot in the foot.

Q. Did Mr. Ochoa indicate that Mr. Espinosa was involved in that physical altercation at all?

A. No. He said he was not involved. He didn't

see him.

Q. Okay. And, in fact, what – what did he tell you about Mr. Espinosa's involvement in any altercation? I'm trying to ask this so it's not leading.

A. He thought that Mr. Espinosa's friend might be involved, but he didn't know that for sure. And that he said regarding – I'm not sure what you're asking me.

Q. Look in your report, page two. Let me count the paragraphs. One, two, three, four, end of the fourth paragraph. Did you record some information about – that Mr. Ochoa told you about Mr. Espinosa's involvement?

A. Yes. He said that there was no problem and he refused to fight.

Q. That is Mr. Espinosa?

A. Correct.

Q. Sammy Ochoa told you that Mr. Espinosa said there was no problem and Mr. Espinosa refused to fight; is that right?

A. Yes, that's correct.

Q. Then he told you subsequent to that he was in a fight with other people and was shot in the foot?

A. Yes.

Q. Okay. All right. What else did you talk about?

THE COURT: Do we really need to get into

that?

BY MR. NICOLINI:

Q. Did he deny shooting Mr. Espinosa?

A. Yes, he did.

Q. Did you end the interview at that point or did you – did you take a pause in it?

A. I left to go check my case file for a minute, came back a few minutes later. And he said something to the effect of I'm going to go to jail no matter what I say. And I told him yeah, that was true. And at one point he said that it's my word against his, in my mind referring to Mr. Espinosa. And then he said he didn't want to talk any more without a lawyer, and I stopped asking questions.

Q. That was the end of the interview?

A. Yes.

Q. All right. Did you subsequently develop information that he may have lied about being shot in the foot?

A. Yes.

Q. And what was the source of that?

A. Mr. - -

MR. POLIS: Pardon me. Objection. What's the —

THE COURT: Yeah, I'm confused about that.

BY MR. NICOLINI:

Q. All right. I guess we don't have to get into that.

MR. NICOLINI: I think in terms of the motions, that's all I need from this witness.

THE COURT: Let me just clarify something, Mr. Ochoa sees the tape-recorder, asks if it's on?

THE WITNESS: Yes, sir.

THE COURT: And did you ever tell him that even though you would not tape-record the conversation, that it could be used against him any way?

THE WITNESS: Not that specifically.

THE COURT: Tell me about that part of it again.

THE WITNESS: Just – just in the Miranda rights that would be used against him. I didn't give an additional clarification to the fact that talking to me would also be used.

THE COURT: Cross-examine?

CROSS-EXAMINATION

BY MR. POLIS:

Q. Just briefly. When he sees the tape-recorder, he tells you – and I think this is a quote – I won't talk with that on, I don't want what I say to be used against me? Is that what he tells you?

A. Yes, sir.

Q. Okay. You then say to him – and I'll just quote from your report so that it's accurate – you say to him, quote, that the tape-recorder was not on. You told him that the tape-recorder was simply a tool to document his side of the story. Is that what you told him?

A. Yes, sir.

Q. Okay. And that was directly after he told you he didn't want to talk with the tape on because he didn't want what he said to be used against him?

A. Yes, sir.

Q. Now, just so that I'm clear here, you do not maintain, do you, sir, that your report contains all of your conversation with Mr. Ochoa?

A. Correct, that is correct.

Q. You just took certain statements that he made, put them in quotes and put them in your report from your notes?

A. Yes.

Q. Okay. And those were statements that you thought were the most significant; right?

A. Yes.

Q. How long was your conversation with Mr. Ochoa?

A. Maybe ten or 15 minutes.

Q. Okay. And after you told him that the tape-recorder was a tool for getting his side of the story, he then asked you if he was under arrest; correct?

A. Yes, sir.

Q. But where you were interviewing him was in an interview room at the police station; correct?

A. Yes.

Q. Okay. And before you Mirandized him did you tell him he was under arrest?

A. Can I check my supplement again?

Q. Sure, please do.

A. – I don't believe that I told him he was actually under arrest before I read him his rights.

Q. Okay. Did you tell him anything to that effect?

A. Not that I can recall.

Q. Did you tell him what you were there for?

A. Yes, sir.

Q. What did you tell him?

A. That I was there to talk to him about the shooting with Stephan Espinosa.

Q. Okay. Did you tell him also that depending upon what he says, he could be released?

A. I don't recall saying that.

Q. Or something to that effect?

A. No, I don't recall saying anything like that.

Q. Okay, sir.

He – after you told him that the recorder was simply a tool, he then asked you if he was under arrest; correct?

A. Yes.

Q. And at that time did you have a discussion with him about whether he was under arrest?

A. I just told him that he was.

Q. Okay. Did you show him a warrant?

A. No, sir.

Q. Did you have the warrant with you?

A. I had a copy of it in my file, yes.

Q. But you didn't show it to him at that time?

A. No, sir.

Q. You told him he was under arrest on what charge?

A. For shooting Stephan Espinosa

Q. Okay, sir. Did he make a comment to that?
A. Right at that time?
Q. Yeah.
A. Can I check my supplement?
Q. Sure.
A. Yes. That's when he made a quote where he said I'll talk to you, but not on tape.
Q. But that was after you told him that the recorder was simply a tool for documenting his side of the story; correct?
A. Yes.
Q. And after you told him that, you at no time told him again that whether he talked on tape or not on tape it could be used against him?
A. That's correct.
Q. Did Mr. Ochoa sometimes say he would take a lie detector test?
A. I don't remember him saying anything about that.
Q. Something to that effect?
A. No. I don't remember anything about a lie detector.
Q. Okay. How many pages were your notes?
A. Oh, probably just the front side of a legal sized tablet, not line for line, just –

Q. Did you record line for line in your supplement what was in your notes?

A. No. Some of it was from memory and some of it was from the notes. The quotes I made sure were exactly from the notes.

Q. But there were some things on the notes that are not contained in this report; correct?

A. Well, I don't – I don't remember. I wrote most of it from memory and then added the quotes from the report.

Q. Okay. Mr. Ochoa told you after Mr. Espinosa said there was no problem that Mr. Ochoa walked away; correct?

A. Yes. Are you referring to the BK Taco Stand?

Q. I am, sir.

A. That's correct.

Q. That's when he said he was attacked?

A. Yes, sir.

Q. By who he believed were friends of Mr. Espinosa?

A. Yes, sir.

Q. Did you at any time tell him, sir, that you knew that he shot Mr. Espinosa?

A. I probably did. I don't have an independent

recollection, but that's something I would say. And I believe that I did say it.

Q. Okay. And at what time during this interview did you say I know you shot Mr. Espinosa?

A. Probably in the beginning at some point. I can't tell you exactly what point it was in there. That's when I said I believe – when I told him what he was under arrest for, probably right around there then.

Q. Okay.

A. The way I recall it, it was connected to for the shooting of Steve Espinosa. I know you shot him, I know what happened type of thing –

Q. Okay.

A. – as an opening kind of remark.

Q. And what did he say?

A. He didn't say anything to that. It just went on to his denial that he shot him later on in the conversation. He denied doing it.

Q. Let me get this straight, sir. You say to him I know you shot Mr. Espinosa, I know what happened, and you say he remained silent at that time?

A. Yeah. That sounds – yes.

Q. Then what do you say, through you then forced the issue?

THE COURT: Is this relevant to the motion

to suppress?

MR. POLIS: Well, it may be, Judge. We don't have the whole conversation. We got a 15-minute conversation. And there's obvious issues about voluntariness, issues about overbearing as well. And I think you need to hear this part of it, frankly.

THE COURT: Go ahead.

A. Can you repeat the question, please?

Q. Yeah. When he says nothing, you obviously then say something else; right? In other words, you press the issue?

A. Let me look at my supplement here for a second.

The way I remember it, I said it in the section right around when he said I'm not going to talk to you on tape. That was part of my way of telling him that I had already heard the other side of the story and I knew what happened. And then beyond that, he – we had the conversation about him–that there was a problem with him and Cesar, Mr. Espinosa.

Q. Let me clarify this then, sir.

A. Okay.

Q. You're telling us now that you turn on the tape?

A. No. sir.

Q. You show him the tape?
A. No, sir. I just put it on the desk.
Q. Well, that's – It was in his view?
A. Yes, sir.
Q. Okay. And that's when you say to him I know you shot Mr. Espinosa, I know what happened?
A. No I said – when I told him he was under arrest when we had the conversation about him being under arrest, I said yeah, you're under arrest for shooting Espinosa. I know what happened. I know you did it. And then we went on from there.
Q. And this is after he tells you he doesn't want to talk on tape because he doesn't want anything used against him?
A. Yes.
Q. Okay. At some point, sir, he says to you no matter what I say, I'm going to jail?
A. Yes.
Q. Okay. When –
A. After I came back from checking my file.
Q. Okay. What – did you ask him a question before he says that?
A. No. I walked in and had my file with me at that point. And then he just said no matter what I say, I'm going to jail.

Q. Is there any time before that, sir, that you suggested to him that whether he was going to jail depended upon what he said?

A. No.

Q. How did the subject then come up then, sir, where he – are you telling me that out of the blue he just says no matter what I say, I'm going to jail then?

A. Well, he was in handcuffs and he was transported from Osborne and 22nd Street in a police car.

Q. Well, that's after, though?

A. No, sir. That was before. That's when he was stopped for the traffic violation and brought over to South Tucson.

Q. Okay. My question, though, sir, is are you testifying that out of the blue he says no matter what I say, I'm going to jail then?

A. Yes, sir.

Q. And there was no – and your testimony is that there was no discussion before that about the impact on his saying something to you or his side of the story on whether or not he was going to jail?

A. Not that I can recall, no.

Q. Was anyone else present during this interview?

A. No, sir.

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

| | | |
|---|---|---|
| STATE OF ARIZONA, | ) | |
| | ) | |
| Plaintiff, | ) | 2CA-CR 00-0542 |
| vs. | ) | |
| SAMUEL NMN OCHOA, | ) | NO. CR-64102 |
| | ) | |
| Defendant. | ) | |
| | ) | |

BEFORE: THE HONORABLE RICHARD D. NICHOLS, JUDGE

Division 14

APPEARANCES:

DANIEL A. NICOLINI, Esq.
On behalf of the State:

COPY

BERTRAM POLIS, Esq.
On behalf of the Defendant.

JURY TRIAL. DAY ONE

November 14, 2000

Denise M. Gonzales, RMR
Certified Court Reporter

DEFENSE

He was the assigned case detective on this case. And he pursued investigation of the case initially reviewing reports of officers at the scene. Other officers responded and collected evidence which you'll hear about including the shell casings in the street.

Detective Randy Deeming dug some bullets out of the car itself. At least one bullet was recovered from the hospital from Steve Espinosa's body. But the car, the green Intrepid was driven away and not to be seen and not found that night.

When Detective Briamonte was assigned, one of the first things he needed to do was interview Steve Espinosa who up to that point hadn't been interviewed because he was in no condition to be interviewed. He had been in the hospital for quite some time. He was at home.

And, finally, on November 6th I believe it was, of '98, Detective Briamonte was able to interview him at home although he was still in a heavily medicated and very grave condition but recovering and able to talk. And he told Detective Briamonte that Sammy Ochoa had shot him.

A warrant was issued for Sammy Ochoa's arrest. He wasn't located at this time, but he was picked up on the warrant on December 23rd about five or six weeks later. And at that time Detective Briamonte met Mr. Ochoa at the police station and he read him his rights, you know,

the rights that we've all heard on every TV show. You have a right to remain silent. Everything you say can be used against you and so forth. And Mr. Ochoa agreed to talk to him, but he would only do it if it was off tape.

MR. POLIS: Objection, Your Honor.

THE COURT: Come on up.

(The following discussion occurred at sidebar.)

MR. POLIS: This is an invocation of my client's rights.

MR. NICOLINI: No, it isn't.

MR. POLIS: It is.

MR. NICOLINI: That is precisely what the testimony was at the first trial. He agreed to talk, but only off tape. And the jury heard all about this.

MR. POLIS: Well, I believe this is an invocation of my client's right. It's a comment on my client's exercise of his Fifth Amendment right.

THE COURT: Overruled. That's not an invocation.

(The sidebar discussion ended.)

MR. NICOLINI: Sammy Ochoa told Detective Briamonte that he would talk to him, but not on tape. So Detective Briamonte took very careful notes and wrote a very careful report at the conclusion of this brief

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

| | | |
|---|---|---|
| STATE OF ARIZONA, | ) | |
| | ) | |
| Plaintiff, | ) | 2CA-CR 00-542 |
| vs. | ) | |
| SAMUEL NMN OCHOA, | ) | NO. CR-64102 |
| | ) | |
| Defendant. | ) | |
| | ) | |

BEFORE: THE HONORABLE RICHARD D. NICHOLS, JUDGE

Division 14

APPEARANCES:

DANIEL A. NICOLINI, Esq.
On behalf of the State:

COPY

BERTRAM POLIS, Esq.
On behalf of the Defendant.

JURY TRIAL. DAY THREE

November 16, 2000

Denise M. Gonzales, RMR
Certified Court Reporter

DEFENSE

A. Yes, I do.

Q. Could you please take it out and tell the jury or read to the jury exactly what you told Sammy Ochoa about his rights, Miranda rights?

A. Yes. You have a right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to the presence of an attorney to assist you prior to questioning and to be with you during questioning if you so desire.

If you cannot afford an attorney, you have the right to have an attorney appointed for you prior to questioning. And then I ask do you understand these rights.

Q. Did he respond?

A. Yes, he did.

Q. What did he say?

A. Yes.

Q. What is your next question?

A. Now having been advised of these rights and understanding these rights, will you answer my questions.

Q. What did he say?

A. Yes.

Q. All right. Now, did you have a tape-recorder with you?

A. Yes. I did.

Q. Did you put it on – what was the setting where this interview was occurring?

A. I think this was in an office that was provided for me by the South Tucson Officers to speak to Mr. Ochoa. So there's a desk and somebody else's stuff in there.

Q. And a couple of chairs?

A. Yes.

Q. Okay. Was anyone else present at any time during this interview?

A. No.

Q. Did you put your tape-recorder on the table or the desk?

A. I had my notepads. And the tape-recorder, I had those sitting on the desk next to me.

Q. Do you normally tape-record interviews of this sort?

A. Yes.

Q. Why is that?

A. To document exactly what's being said.

Q. Okay. Did you record this one?

A. No.

Q. Why not?

MR. POLIS: Objection. Your Honor.

THE COURT: Overruled. Go ahead.

BY MR. NICOLINI:

Q. What happened that caused you not to record it?

A. I have some exact quotes in the report. But basically Mr. Ochoa asked that I did not tape-record it.

Q. Okay. And when you put quotes in your report are those phrases exactly what you were told?

A. The quotes are, yes.

Q. And you wrote them down verbatim and recorded it in the typed report later?

MR. POLIS: Objection, leading.

THE COURT: Overruled.

A. I did, yes.

Q. What exactly did Mr. Ochoa say to you about your use of the tape-recorder?

A. May I refer to my report?

Q. Please do.

A. The first – the first quote that I have after his response to Miranda was I won't – I won't talk with that on. I don't want what I say to be used against me.

MR. POLIS: Pardon me, Your Honor. May I approach? I object.

THE COURT: Come on up.

(The following discussion occurred at sidebar.)

MR. POLIS: I move for a mistrial. That's a direct invocation of his rights. That is beyond what he put in the statement. We litigated this. He can't bring up his invocation of his rights.

MR. NICOLINI: We have been through a motion to suppress on this before, and this whole thing's been resolved.

MR. POLIS: It has not been resolved. He did not mention it in opening statement. Now he brings out directly that my client invokes his rights.

THE COURT: How, as – that was as to the tape-recording issue; right?

MR. POLIS: Yeah, but what he says is I don't want it to be used against me. Now how can that come in after Miranda?

THE COURT: We did have a motion to suppress.

MR. POLIS: Yeah, but you never ruled that this could come in. What you ruled is that his statement could come in, not his invocation of rights.

THE COURT: I'll stand by the original decision.

MR. POLIS: There is no original decision, Judge. You never ruled on this issue. He didn't bring it

up at the last trial.

MR. NICOLINI: It's right there in quotes in the report.

MR. POLIS: That may be, but you did not bring it up in testimony. I object to it in opening statement. We didn't go this far. Now he's going further. He has basically told this jury that my client refused to talk because he didn't want it used against him.

MR. NICOLINI: What I said was he didn't want to talk on tape.

MR. POLIS: Because it could be used against him. That's an invocation of his rights after Miranda. He can't bring it up. He didn't bring it up last time. I move for a mistrial. This is totally improper. He kept away from it in opening statement. And he did it. It prejudiced my client.

MR. NICOLINI: Judge, I asked the question – pardon?

THE COURT: I'll show it's denied.

MR. NICOLINI: Thank you.

(The sidebar discussion ended.)

BY MR. NICOLINI:

Q. And, Detective, did you record an additional quote to Mr. Ochoa as to what he said about your use of the